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Identical letters dated 29 July 2008 from the Permanent Representative of the Sudan to the United Nations addressed to the Secretary-General and the President of the Security Council

Upon instructions from my Government I have the honour to transmit to you the statement made by Abdulbasit Sabdarat, Minister of Justice of the Republic of the Sudan, before the African Union Peace and Security Council in Addis Ababa, on Monday, 21 July 2008, in connection with the so-called application made by the Prosecutor of the International Criminal Court (see annex).

I would like to draw your kind attention to paragraph 13 of the statement.

I should be grateful if the present letter and its attachment were circulated as a document of the Security Council.

(*Signed*) Abdalmahmood Abdalhaleem **Mohamad**
Permanent Representative

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Annex to the identical letters dated 29 July 2008 from the Permanent Representative of the Sudan to the United Nations addressed to the Secretary-General and the President of the Security Council

1. At the outset allow me to express the condolences of the Government and people of the Sudan to the governments, peoples and families of all the martyrs of African who lost their lives while performing their sacred duties in Darfur. The Sudanese people will never forget these sacrifices.

2. We are grateful to the sisterly States, members of this august body, for their prompt response and action to convene this urgent meeting of the PSC at ministerial level to consider the situation created as a result of the recent move by the ICC Prosecutor General, requesting the ICC Chambers to issue an arrest warrant against the President of the Republic of the Sudan for alleged crimes in Darfur including genocide. Surprisingly the allegations were spread by the ICC Prosecutor General to incriminate the entire apparatus of the state in the Sudan i.e. the dismantling of the whole political system in the country. You can judge of the real motivations of the ICC Prosecutor.

3. We have already noted with great esteem and appreciation the consultations initiated by the Chairperson of the AU Commission, H.E. Mr. Jean Ping, with the United Nations Secretary-General and other stakeholders including the Arab League and the Organization of the Islamic Conference regarding the developments and implications of the present situation.

4. We are also appreciative of the urgent visit taken by H.E. Ambassador Ramtane Lamamra, the African Union Commissioner for Peace and Security, to the Sudan during the period 14-15 July 2008 to meet with H.E. President Omer Hassan Ahmed el-Bashir and the other senior Sudanese officials, in an excellent step to address ways and means of holding preparatory consultations regarding actions needed to be taken to handle the situation. We shall always remain open to such initiatives.

5. You may not disagree with me that the action taken by the ICC Prosecutor sets a serious precedent in the history of international relations, and challenges the very strong convictions of all leaders of the world and the African leaders in particular as regards the prevalent concepts of sovereignty and immunity of Heads of State. It is an action that is based on false pretences, hearsay and is politically motivated and unjustified.

6. Before elaborating on the dangerous, unjustified and miscalculated move of the ICC Prosecutor General, I would like to refresh the memories of my distinguished brothers and sisters members of this Council about certain basic facts relating to the way in which the conflict in Darfur erupted:

6.1 The fighting in Darfur was originally initiated by the rebels in Darfur. They started targeting airports, banks, police stations, local government departments, and headquarters of major development schemes. Their attacks also extended to the properties of civilians in the outskirts of major cities, including using civilians as human shields to deter countermeasures by government law enforcement agencies.

6.2 The Government in the Sudan moved to arrest the problem acting within its constitutional prerogative. Its actions solely aimed at protecting law and order as well as the lives and properties of its citizens. What would the world look like if every action by the national authorities to keep law and order were subject to the kind of tests adopted by the ICC Prosecutor?

6.3 Unfortunately, the actions of the rebel groups led to more internal displacement to government-controlled areas and exodus of refugees to neighbouring countries. Most of the village burning and killings was carried out by the rebels and the spontaneous tribal resistance that suddenly erupted in wide areas in Darfur before the government forces were able to contain the situation.

6.4 In spite of the fact that the Government was able to contain the rebellion in Darfur, it has nonetheless positively reacted in good faith to all ceasefire initiatives and peace talks from Abéché, N'Djamena and Abuja to Sirte. The Government of the Sudan is still committed to peaceful settlement through negotiations. The fragmentation and splintering of the factions of rebels in Darfur and their refusal to negotiate remains the major obstacle facing our quest for peace until this very moment.

6.5 The multiple non-African external political vibes and interferences critically narrowed the opportunities for cessation of hostilities and a peaceful resolution of the problem in Darfur. These interferences have the hidden agenda of shifting the focus from the killings and human rights abuses in other areas. The recent move of the ICC Prosecutor provided an additional moral boost to those rebels from Darfur who savagely attacked our national capital Omdurman on 10 May 2008. This freshly given moral support will cause further deterioration in the security and humanitarian situation and cripple the political process stranded since the Sirte resumed round of talks. The chaos in an unstable Sudan will have a spillover effect throughout the region.

6.6 The fact that the ICC Prosecutor succumbed and acquiesced to political pressure is manifested in the leakage pronounced by the official circles of certain countries known for their hostility against the Sudan even before the Prosecutor officially announced his move to accuse the President of the Republic of the Sudan.

7. The most serious repercussions of such an action undermine, pre-empt and endanger the unfettered efforts made by the African Union, the United Nations and the Government of National Unity in the Sudan towards the peaceful resolution of the conflict in Darfur, the implementation of the Comprehensive Peace Agreement and the Eastern Sudan Peace Agreement. The ICC Prosecutor General had actually compromised the very obvious principles of international law, including the principle of complementarity enshrined in the Rome Statute of 1998 itself, to the vicious pressures pounded on him by certain western Governments and pressure groups.

8. Regrettably, the action of the ICC Prosecutor represents a flagrant intervention into the internal affairs of the Sudan in a very damaging way. It is a political move that would damage the achievements of peace and the democratic transformation in the Sudan. In addition to his stature as President of the Republic and a symbol of the sovereignty of the country, H.E. Omer Hassan Ahmed el-Bashir is in fact an indispensable guarantor of the three major peace accords in the Sudan, namely, the Comprehensive Peace Agreement, the Darfur Peace Agreement and the Eastern

Sudan Peace Agreement. All these accords are now part and parcel of the Interim Constitution of the Sudan 2005. Rejecting the action of the ICC Prosecutor in the strongest terms possible will eventually preserve the hard-won achievements of peace in the Sudan and the stability in the region and will not compromise our convictions and beliefs on the sensitive matters of sovereignty and immunity of Heads of State.

9. The Republic of the Sudan is not a party to the Statute of the International Criminal Court done at Rome on 17 July 1998 (the Rome Statute), and which entered into force on 1 July 2002. The ICC was designed to perform in accordance with the fundamental standards of due process and to pursue its entrusted duties with impartiality and effectiveness. It is important for the ICC as a nascent legal forum to independently apply justice in a fair and even-handed manner, thereby contributing to the creation of a solid international criminal justice system. As such, there is an apprehension that the Court must be shielded and protected from negative political influences and misunderstandings from powers and agencies external to it.

10. The preparatory works of the ICC Preparatory Commission reveal that many delegations have cautioned against giving a political entity the ability to influence the Court in a manner that would affect its independence. Unfortunately, the United Nations Security Council gave the first blow to the impartiality of the ICC. Its resolution 1422 (2002), adopted on 12 July 2002, stands as a clear manifestation of this serious flaw. Acting under Chapter VII of the Charter of the United Nations the Security Council requested that personnel from a contributing State not a party to the Rome Statute shall be exempted from the investigation or prosecution of the Court.

11. Against this background, Security Council resolution 1593 (2005) referring the situation in Darfur to the International Criminal Court was, and is by and large, influenced by political considerations. The issue of Darfur was originally brought to the table of the Security Council under the false pretences of threats to international peace and security, therefore giving those challenging the constitutional order in the country a political momentum. The resolution came within a series of resolutions aiming at putting pressure on the Government of the Sudan for various reasons. Some powers that were campaigning against the Sudan in the Council, such as the United States, were not genuinely interested in bringing about justice. On the contrary, they were known for their firm opposition to the Court.

12. The process of dragging the Sudan to the ICC began with the mandate given by the Security Council to the International Commission of Inquiry led by the Italian jurist Antonio Cassese. Antonio Cassese and his team visited the Sudan for a short period of time and came out with the desired political prescription to allegedly describe the judiciary in the Sudan as unable and unwilling to prosecute the perpetrators of the crimes alleged to have been committed in Darfur. The Security Council was in fact entrapped and misled by this statement, which was then the only prescription by which the Security Council could put pressure on the Sudan and refer the situation in Darfur to the jurisdiction of the ICC.

13. At the time resolution 1593 (2005) was adopted there were no means of constructive dialogue between the Sudan and the United Nations. The views of the Sudan on the contents of that resolution were not sufficiently heard or given the weight they deserve. That was the reason why the relationship between the Sudan

and the United Nations suffered many setbacks. It was only after the visit of Ban Ki-moon to the Sudan during 2007 that channels of constructive dialogue were established and positive results such as resolution 1769 (2007) and the deployment of UNAMID were possible.

14. Whether what happened in Darfur is genocide or not, I wish to refer you to some of the views of international legal experts and renowned politicians involved in the issue of Darfur and who were courageous enough to voice their understanding and opinion on the issue. The recent vindictive findings of the ICC Prosecutor contradict the letter and spirit of all these findings, namely:

14.1 Former President of Nigeria H.E. Olusegan Obasango outlined the African Union position in refuting genocide allegations, saying: "What we know is that there was an uprising, rebellion, and the government armed another group of people to stop that rebellion. That's what we know. that does not amount to genocide from our own reckoning".

14.2 The International Commission on Inquiry for Darfur chaired by the Italian jurist Antonio Cassese established by United Nations Security Council resolution 1564 (2004) reported to the Security Council itself, that "while there had been serious violations of human rights in Darfur, genocide had not occurred".

14.3 Mr. John Danforth, President Bush's former Special Envoy to the Sudan, said in an interview with the BBC in July 2005, that "the genocide label was something that was said for internal consumption within the United States".

14.4 Mr. Kofi Annan, the former United Nations Secretary-General, commenting on allegations of genocide in Darfur, noted: "I cannot call the killing genocide even though there have been massive violations of international humanitarian law." Even the ICC Prosecutor had cast doubt on the results of his own investigations when he admitted that "he has to investigate the situation in Darfur without going to Darfur for security reasons".

14.5 The ICC Prosecutor also outlined before the fifth Assembly of States Parties to the ICC held in The Hague in November 2006 the different types of crimes against humanity his investigations revealed in Darfur. Genocide was never among the counts discovered by the ICC Prosecutor through the investigations he had undertaken since his assumption of office. Surprisingly the ICC Prosecutor and despite all of the captioned quotations obstinately came up with allegations of genocide in Darfur. Even this Council has never taken the view that what is happening in Darfur is genocide.

15. Does the United Nations Security Council have the authority to make a State Member of the United Nations bound and subject to the provisions of an international treaty to which that Member State is not a party? It is true that Member States are bound to obey the Security Council resolutions in accordance with Article 25 of the Charter. But a Member State has the right to make its reservations if the decision taken by the Security Council contradicts the fundamental principles of international law. The important question that remains to be answered to the satisfaction of smaller or vulnerable members of the international community is: Does the Security Council really have the authority to make a State Member of the United Nations subject to treaties to which such a Member State is not a party? Does the Security Council have the right to abolish the sovereignty and independence of United Nations Member States?

16. The Sudan does not condone impunity and would prosecute crimes of all sorts. The Sudan is not governed by the law of the jungle. It is a responsible State with an independent judicial system. The principle of complementarity constitutes the core premise of the Court and gives primacy to national jurisdictions. Under the principle of complementarity, the ICC exercises its jurisdiction only when States parties, and naturally States under the jurisdiction of the Court by way of referral from the Security Council, fail to investigate or undertake judicial procedures in good faith, after a crime covered under the ICC Statute has been committed.

17. It is obvious, therefore, that the principle of complementarity triggers and comes into play the moment the State in question commences investigation or tries the case. Despite the reservations, the Government of the Sudan has begun an intensive process of consultation and cooperation with the Court and its Office of the Prosecutor. It is believed, then, that has been a wise decision by the Sudan to cooperate, nonetheless, with the Court and to seek at the same time invocation of the ICC principle of complementarity. The Sudan, at an earlier stage, opted to cooperate with the Court, because paragraph 2 of Security Council resolution 1593 (2005) required the Government of the Sudan to cooperate fully with, and provide information and necessary assistance to, the Court and the Prosecutor. Other States and organizations are also urged to cooperate fully.

18. The various delegations sent by the Court to the Sudan attest to the degree of cooperation extended by the Sudan. The ICC Prosecutor confirmed in his statement before the fifth Assembly of States Parties to the Rome Statute held in The Hague in November 2006 that the delegations sent by the Court to the Sudan were given the opportunity to put questions to the armed forces, meet representatives of local judicial and investigative mechanisms, including judges and prosecutors dealing with events in Darfur as well as measures taken by the Government for compensation. The Court has also had the opportunity to see, through the Office of the Prosecutor, how the judiciary in the Sudan enjoys a long-standing heritage of independence and integrity, to the extent of challenging any biased political conclusions. All this bright record of cooperation between the Sudan and the ICC had been trashed by the ICC Prosecutor unjustifiably.

19. The Government of the Sudan made the necessary amendments to its Penal Code and established Special Courts in order to investigate and try the alleged cases of violations of international humanitarian law in Darfur. The National Special Court for Darfur and the two subregional Courts in Genaina and Nyala are a clear manifestation of the will and ability of the Sudan to fight impunity. The National Special Court and other prosecutor teams in the Sudan have not yet finished their work due to the fact that suspects as well as witnesses could not be fully accessed under the current prevailing conditions in Darfur.

20. The Government of the Sudan is sparing no effort in its continuing endeavours to establish the rule of law and justice through the mechanisms set up in the Darfur Peace Agreement. This effort will, in due course, be combined with activation of the widely accepted traditional mechanisms of dispute settlement. Practical steps are being taken in the direction of launching the Darfur-Darfur Dialogue which will eventually trigger the traditional mechanisms of dispute settlement. All these measures would positively contribute to the sustainability of peace in Darfur, which is the only concrete reality that brings justice and stability.

21. The Prosecutor said before the fifth Assembly of States Parties to the ICC held in The Hague in November 2006 that, due to the adverse security situation in Darfur "he had to investigate the situation in Darfur without going to Darfur"! This casts a heavy shadow on the finality of the investigations as well as the interviews conducted by the Office of the Prosecutor for a number of reasons, among which is the evidential weight and value of what he had heard from witnesses without going to Darfur. Those witnesses who actually belong to the ranks of the rebels in Darfur have constantly been coached, groomed and prepared for that purpose by many of the hostile pressure groups spearheading the political campaign against the Sudan.

22. Fortunately, after the recent developments, international policymakers have come to realize that the "Prosecutor's legal strategy also poses major risks for the fragile peace and security environment in the Sudan, with a real chance of greatly increasing the suffering of very large numbers of its people ...". In their view, the significant risks resulting from the ICC Prosecutor's unruly action will be: "Undermining the fragile North-South peace process, bring an end to any chance of political negotiations in Darfur, make impossible the effective deployment of UNAMID, put at risk the humanitarian relief operations presently keeping alive over 2 million people in Darfur, and lead to inflammation of wider regional tensions."

23. The realization of peace and order in Darfur is a precondition for the service of justice in that troubled region. Justice is required in Darfur in order to restore the social texture which is damaged by reason of internal and external factors, but such a restoration cannot take place without first achieving peace. What is badly needed in such a complex situation is to have sustainable peace and an agreeable framework within which the occurring damage could be repaired.

24. The paradigm of peace and that of justice would presumably accommodate the "interest of the victims" in a given conflict situation. In Darfur, for example, the interest of the victims should be taken into account regarding whether the ICC should proceed to prosecute those responsible for the alleged crimes or make way for the civil society forces in Darfur to say their word and to state their priorities.

25. The conceived idea of the Darfur-Darfur Dialogue Conference could represent an acceptable forum for all parties concerned, including the victims, to say their word about the way forward: whether they prefer prosecutions to take place forthwith, or re-stitch the social texture by agreeing to peace first and thereafter consider how to deal with the outstanding issues according to recognized practice, including a developed concept of reparation to the victims. Focusing only on absolute justice outside the domestic framework could be detrimental and costly without a guarantee that the process will result in sustainable peace. A huge force, expense and political cost may be needed to serve justice blindly without any assurance that the result achieved justifies the effort. What is needed is a process through which human rights can be promoted and sustainable peace realized.

26. The vicious dreams of the perpetrators behind the ICC Prosecutor in destabilizing the Sudan and undermining the peace and democratic transformation achievements in the Sudan will not come true. The Sudan is utterly committed to the agreements and bonds so far reached regarding the Comprehensive Peace Agreement and the roadmap to peace in Darfur. However, and in order to achieve our desired noble goals, we need to be united on the face of this new wave of imperialism and hegemony. The Sudan, one of the early founding members of this

Organization, and one of the strong supporters of the Pan-African movement, shall not be made the Achilles heel of Africa, through which neocolonialism will re-scramble into our continent. The Sudan has always opted for an African solution under the umbrella of the African Union.

27. To conclude, the move of the ICC Prosecutor raises other serious considerations. There have been as many failures as successes, perhaps more, in the international protective record in recent years. There are continuing fears about a "right to intervene" being formally acknowledged. If intervention for human protection purposes is to be accepted, including the possibility of military action or an indictment of an incumbent Head of State, it remains imperative that the international community develop consistent, credible and enforceable standards to guide state and intergovernmental practice. This provides a clear indication that the tools, devices and thinking of international relations need now to be comprehensively reassessed, in order to meet the foreseeable needs of the twenty-first century.

28. The manipulations of the ICC Prosecutor are intended to hamper the African Union initiatives, represented by this Council. My Government remains committed and open to African initiatives and solutions. We welcome and look forward to cooperate with the newly appointed joint negotiator Mr. Djibril Bassolé. Therefore, my Government of National Unity solicits the indulgence of this honourable Council to strongly condemn and reject the recent step and the unfounded accusations made by the ICC Prosecutor General, to reaffirm the decision of the AU Summit of Sharm el-Sheikh concerning the sovereignty of States, immunity of Heads of State and double standards, to call upon the Security Council to immediately halt the process before the ICC and give full effect to the principle of complementarity so that the Sudanese judicial system can be supported to fully assume its role without hindrances, and that the focus shall be given to the political solution of the conflict in Darfur by creating a conducive atmosphere for the newly appointed joint chief negotiator, all in full coordination with the regional and international entities in that regard.